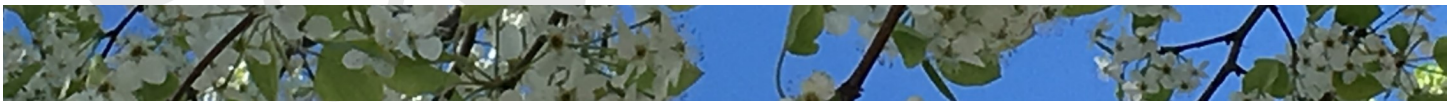
Noise Ordinance Explained

Amplified Sound

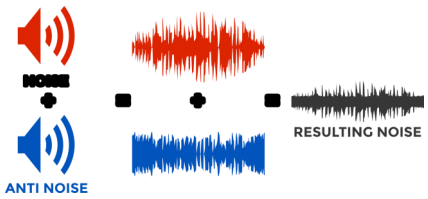
Warm weather is on its way, and with it will come an increase in the number of noise disturbance calls in our city. Many of these calls involve outdoor karaoke, live bands, or "jumpy houses" in residential areas. While it may seem common sense that having karaoke or a live band in the backyard at 1:00 a.m. would be disturbing to neighbors, there seems to be a lot of people who don't see it that way. In addition, it seems that the calls are increasing for complaints of loud music from bars and event centers as well. The most common noise complaints have to do with noise originating from places like Zabana, Civic Center, Pachenga, and the Metroplex. Some of these places have been disturbing citizens for years, but enforcement has been spotty at best.

To simplify the enforcement of the noise ordinance, the Springdale City Council in 2014 passed an amendment to the noise ordinance to make it easier for the Police Department to enforce the noise ordinance in these situations, and to reduce the reliance on decibel readings in situations involving

See page 3 for an analysis of No Drivers' License Offenses in Springdale for 2015.



"amplified sound". Specifically, the ordinance amended section 42-51 of the Code of Ordinances to change the definition of "noise disturbance" to read as follows:



***Noise disturbance* means:**

(1) The creating of any unreasonably loud and disturbing sound of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.
(2) Owning, keeping, possessing, or harboring any animal or animals that continuously, repeatedly, or persistently, without provocation by the complainant, creates a sound which unreasonably disturbs or interferes with the peace, comfort or repose of persons of ordinary sensibilities.
(3) The creating of any unreasonably loud and disturbing sound by a sound amplification device of such character, intensity, or duration as to be detrimental to the life or health of an individual, or which annoys or disturbs a reasonable person of normal sensitivities.

The language added in 2014 is found in (3) above. In other words, if noise caused by a "sound amplification device" is of such a character, intensity, or duration that it annoys or disturbs a reasonable person, then it is a violation *regardless of the decibel reading.* This is an important point to remember when a noise complaint comes in at 2:00 a.m., and the caller reports that the thumping bass from the music down the street, or from the bar down the road, is keeping the caller awake. If the officer verifies these facts by hearing it from where the complaint is called in from, and can truthfully testify that the noise is of such a character to annoy or disturb a reasonable person, then the officer has probable cause to write a citation for a noise ordinance violation to the person who is causing the noise disturbance.

Certainly, an officer has the discretion whether or not to write a citation once a noise disturbance is confirmed. The officer has the discretion to advise the person causing the noise disturbance to "turn it down or a ticket will be written", or the officer can choose to write a ticket without giving the person that opportunity. I have noticed on many of these calls, that officers are dispatched 2 or 3 times to the same location before the party/music is finally ended for the night. This seems like a lot of needless running back and forth. Hopefully, being armed with an accurate definition of what constitutes a violation of the City's noise ordinance will reduce the need to return to the same location over and over, and will certainly provide the complaining citizens some long-awaited peace and quiet.

Music from Vehicles

There also seems to be an increase in the number of calls regarding noise originating from a vehicle. Certainly, this would also fall within a "sound amplification device" under Section 42-51(3) above. In addition, Section 42-55 of the Code of Ordinances states as follows:

> (a) It is unlawful to operate any sound amplification device from within a vehicle so that the sound is plainly audible at a distance of 30 feet or more from the vehicle, whether in a street, a highway, an alley, parking lot or driveway, whether public or private property, and such is declared to be a noise disturbance in violation of this chapter.

In other words, if a person is sitting in their living room, and the neighbor drives by with the music thumping so loud that it offends the caller, it is a violation. I personally have seen (heard) this over and over near the intersection of Don Tyson Parkway and Old Missouri Road. It seems that it is literally one vehicle after another driving by with loud music or thumping bass, making it impossible for anyone living in the vicinity to enjoy their homes.

Many times, officers will hear music or thumping as a vehicle passes them, or while sitting at a traffic signal. This is a violation, and is also a legitimate basis for a traffic stop. There are obvious safety reasons for a driver not to have the music too loud. After all, what if you were running code and the driver could not hear your siren because the music was too loud?

Another common example are vehicles parked at convenience stores or gas pumps. For some unknown reason, many people are fond of leaving their music blaring or thumping while they are pumping gas or make a purchase in the store. If it is of such a character to offend someone, or if it can be heard at a distance of more than 30 feet away, it is a violation. It seems like every time I get gas, I witness such a violation.

Hopefully this explanation will provide you with a better understanding of the City's noise ordinance. It can also be a wonderful crime suppression tool, as it provides a basis for a traffic stop, or provides a basis to make contact with an individual. By enforcing the noise ordinance, you may be preventing a more serious offense from taking place.

If you have any questions about the City's noise ordinance, please feel free to contact me at any time.

Presented by

Ernest Cate, City Attorney

AN ANALYSIS OF NO DRIVERS' LICENSE OFFENSES IN THE CITY OF SPRINGDALE FOR 2015

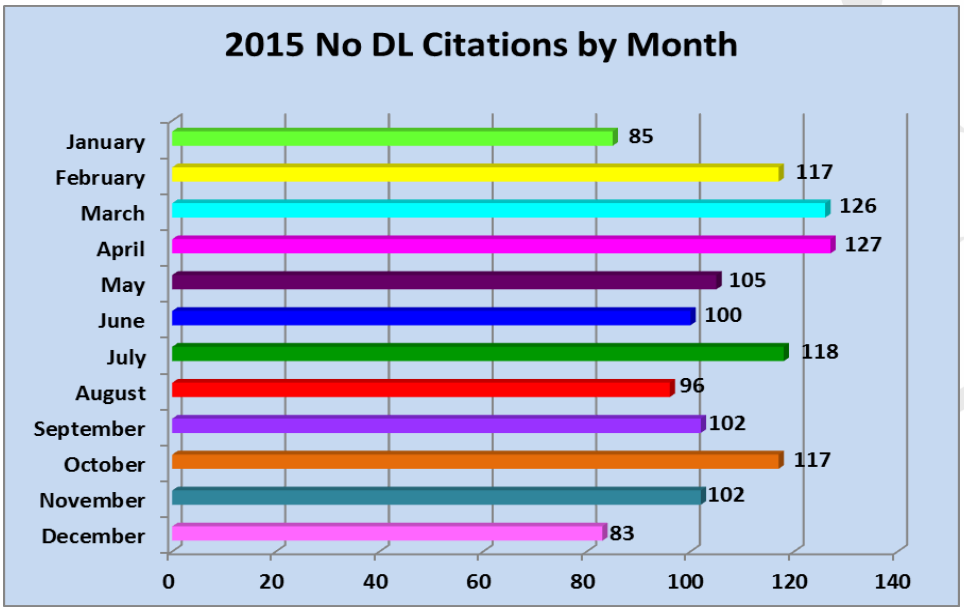
Like many other communities, the City of Springdale has a large number of unlicensed drivers operating motor vehicles on its streets and highways. This is a problem in that unlicensed drivers present a threat to the safety of other motorists and to property owners. After all, there is a reason why one must pass both a written test and a driving test before the State will give someone a drivers' license. Generally speaking, those who have not taken and passed these tests are a danger to themselves and other people, as they likely do not understand the proper "rules of the road".

With this public safety goal in mind, it is both helpful and interesting to analyze the citations issued in Springdale for No Drivers' License ("No DL") during 2015, and comparing those to previous years. In an attempt to compare "apples to apples", it is important to note that every effort has been made to exclude from this analysis any citations for suspended drivers' license, and to focus only on those individuals who do not actually possess a drivers' license.

2015 NO DL CITATIONS

In 2015, a total of 1,278 citations were issued for No DL offenses in Springdale. This is a 2.98% increase over 2014 (1,241 citations) and a 7.67% increase over 2013 (1,187 citations). The following chart indicates how many No DL citations were written each calendar month during 2015, with March (126 citations) and April (127 citations)

being the highest, and January (85 citations) and December (83 citations) being the lowest:



Reasons for Law Enforcement Contact (2015)

Prior to determining if a person possesses a drivers' license, the law enforcement officer must first have some legally valid reason for stopping the vehicle and/or contacting the person. In other words, an officer does not know if a person possesses a drivers' license until after the officer makes contact with the driver. In 2015, the most common reason for officer contact was that the person driving committed a traffic violation. More specifically, of the 1,278 citations written for No DL in Springdale in 2015, 799 were the result of the driver committing a traffic violation. In 2015, 62.52% of those individuals cited for No DL were stopped because of a traffic violation. This number is very similar to 2013 (61.92%) and 2014 (61.24%).

Other reasons exist for officer contact as well. Of the 1,278 citations written for No DL in Springdale in 2015, 201 were the result of an equipment violation on the vehicle (tail light out, broken windshield, etc.). Equipment violations therefore accounted for 15.73% of the traffic stops leading to a No DL citation, compared to 11.12% in 2013 and 14.34% in 2014. 53 No DL citations were the result of a no seatbelt or no child restraint traffic stop in 2015, and 87 No DL citations were the result of an expired or no vehicle tag traffic stop.

Traffic Accidents Involving No DL Drivers in 2015

Another method of determining that a person does not possess a drivers' license is during the investigation of a traffic accident. In 2015, of the 1,278 persons cited for No DL in Springdale, 342 of those were involved in a traffic accident. In other words, 26.76% of the individuals cited for No DL in Springdale in 2015 were involved in a traffic accident. That is 342 traffic accidents that could have been prevented had the person not been driving at all.

This number is quite alarming when compared to 2013 and 2014. In 2015, there were 342 traffic accidents involving a driver with No DL, while 2014 saw 275 such accidents, and 2013 saw 233 such accidents. The 2015 number (342) represents a 24.36% increase over 2014, and an astounding 46.78% increase over 2013. Put more simply, in 2015 there were 67 more traffic accidents involving a driver with No DL than in 2014, and 109 more traffic accidents involving a driver with No DL than in 2013.

It could therefore be said that our streets and highways are becoming less and less safe because of the increase in the number of No DL drivers in the City of Springdale. Given that there were 342 traffic accidents in Springdale in 2015 that involved a driver with No DL, it is tantamount to saying that a traffic accident involving a No DL driver occurs practically every day in the City of Springdale. It can also be said that each and every one of these accidents could have been prevented had the person with No DL not been driving at all. In all, there have been 850 traffic accidents in the City of Springdale involving a person with No DL over the last 3 years.

2015 No DL while Intoxicated

Persons who drive without a drivers' license present a public safety risk. Adding the element of alcohol or drugs makes that

persons' driving doubly dangerous. In other words, a person who does not possess a drivers' license should not drive sober, let alone drive while intoxicated. In 2015, there were 141 DWI arrests of persons who did not have a drivers' license. In other words, of the 1,278 persons cited for No DL in Springdale in 2015, 11.03% of those were driving while intoxicated. That is a disturbing number. However, this number is considerably lower than 2014, which saw 173 DWI arrests of persons who did not have a DL. The 2015 number (141) is more in line with 2013, which saw 143 DWI arrests of persons who did not have a DL.

2015 Repeat No DL Offenders

In 2015, the majority of those individuals cited for No DL were cited for the first time in Springdale. Of the 1,278 person cited for No DL in Springdale in 2015, 685 had no prior offenses in Springdale. In other words, 53.60% of those cited in 2015 had no prior No DL offenses in Springdale. This number is similar to 2014, where 51.49% of No DL citations involved first time offenders, and is very similar to 2013, where 53.92% of those cited for No DL were not repeat offenders.

It should be noted, however, that many of these 685 "first time offenders" did not subsequently appear in court on their citation, and their identities therefore remain questionable. Many of these individuals were unable to produce any form of identification at the time the citation was written, so the officer was forced to believe them if they said their name was "Elvis Presley, date of birth 07/04/1976". As such, many of these "first time offenders" may not have been first time offenders at all. Without any proper documentation, it is simply impossible to identify many of these individuals.

Of the 1,278 individuals cited for No DL in Springdale in 2015, 593 of those had at least one prior offense of No DL in Springdale. In other words, 46.40% of those people cited for No DL in Springdale had at least one prior offense of No DL in Springdale. The number of prior offenses committed by each of these 593 repeat offenders varied anywhere from 1 prior offense to as many as 16 prior offenses. There were 69 individuals cited for No DL in Springdale in 2015 who had 5 or more prior offenses in Springdale, compared to 58 such individuals in 2014 and 57 such individuals in 2013.

2015 Juvenile No DL Offenders

In 2015, 89 No DL citations were written to individuals under the age of 18. This is compared to 94 such citations in 2014, and 73 such citations in 2013. As such, it is vitally important for law enforcement officers to determine who allowed the minor to drive without a drivers' license, and to issue citations for allowing an unauthorized person to drive, where appropriate.

Conclusion

This is the third year that I have kept and evaluated statistics for No DL citations in Springdale. I will continue to do so, so that trends can be noted, and information can be gathered about these offenders. As has been shown in this brief study, analyzing these statistics can also illustrate the need for a change in the law, so to better protect our citizens, and to discourage those without a drivers' license from driving.

It also points out the need for officers to clearly state in their citation narratives how the driver was identified, and the need to state exactly what kind of identification (if any) was presented at the time of the traffic stop. In addition, the narrative should provide information as to what happened with the vehicle. Obviously, an officer would not let an individual with No DL drive away from the traffic stop (right?), but the narrative should state if the vehicle was towed, left on scene, was driven away by a licensed driver, etc. Finally, please do not forget that allowing a person to drive without a DL is just as much a violation as actually driving without a DL, so it is totally appropriate to determine who let the person with No DL drive and to cite for allowing an unauthorized person to drive. For example, just this morning, I read a narrative in which a vehicle was stopped for speeding, The driver was 15 years of age, and had No DL. The mother of the driver was a passenger in the vehicle. Clearly, the mother allowed the 15 year old to drive without a DL, so in addition to the 15 year old getting a citation for No DL, the mother should also be given a citation as

well (for allowing an unauthorized person to drive). A similar analysis should take place whenever the owner of the vehicle arrives to take possession of the vehicle. The officer should determine whether the No DL driver was using the vehicle with the owner's permission or not, and cite accordingly.

Life stands before me like an eternal spring with new and brilliant clothes.
Carl Friedrich Gauss

Presented by

Ernest Cate, City Attorney

Arkansas Court of Appeals Reverses DWI Conviction Because of Illegal Sobriety Checkpoint

FACTS TAKEN FROM THE CASE

On September 20, 2012, Jeremy Whalen encountered a sobriety checkpoint being conducted by the Arkansas State Police on Interstate 540. He was arrested there and later charged with driving while intoxicated.

At Whalen's trial on the DWI, Corporal Dwight Lee testified that "sometimes roadblocks are assigned and if the supervisors don't assign them, I will make a call and say, you know, we're going to do a checkpoint." Corporal Lee said that the supervisors don't actually know where the checkpoint is, and that the checkpoint involving Whalen's arrest was most likely done with Corporal Lee's discretion in setting up the checkpoint. Corporal Lee stated that he was an officer in the field, and that he was using his discretion as to what happened at the roadblock. Corporal Lee also testified that in dealing with individuals, traffic flow, location, and times, the officer in the field uses discretion. Additionally, Corporal Lee said that a supervisor is contacted only if there is some major occurrence such as a collision or chase.

At Whalen's trial, Corporal Lee also said that the officers do not keep records of the number of cars stopped, but they keep records only if a ticket is written. Corporal Lee also said that supervisors normally received information about the checkpoint after the checkpoint is completed, and that supervisors had no input on the plan. Corporal Lee agreed that calling up officers and telling them that there would be a checkpoint was all there was to the procedure for the checkpoint; that he did not go over the plan with officers beyond the intended duration of the checkpoint; and that checkpoints were not even mentioned to supervisors until after they were completed. Corporal Lee conceded

that supervisors expected checkpoints to done, and that the main purpose of checkpoints was to keep officers from getting into trouble.

Jeremy Whalen was found guilty by the trial court of DWI, and he appealed this decision to the Arkansas Court of Appeals.

ARGUMENT AND DECISION BY THE ARKANSAS COURT OF APPEALS

On appeal to the Arkansas Court of Appeals (Court), Whalen argued that the Fourth Amendment of the U.S. Constitution, along with Article II, Section 15 of the Arkansas Constitution, required reversal of his conviction based on the illegally conducted sobriety checkpoint. In setting forth the applicable law, the Court said that a Fourth Amendment seizure occurs when a vehicle is stopped at a roadblock or checkpoint, and the question becomes whether such a seizure is reasonable under the Fourth Amendment. The Court stated that the permissibility of vehicle stops made on less than reasonable

suspicion of criminal activity must be judged in each case by balancing the effect of the intrusion on the individual's Fourth Amendment rights against the promotion of a legitimate government interest. The Court said that there is no doubt as to the magnitude of the State's interest in eradicating drunk driving, and the Court quoted the following language from the United States Supreme Court in *Brown v. Texas*:

> Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Furthermore, the Court noted that some factors to consider in applying the balancing analysis include supervision of the officer in the field, the limited discretion of officers in stopping vehicles, the amount of interference with legitimate traffic, the subjective intrusion on the part of the travelers, the supervisory control over the operation, and the availability of a less intrusive means of promoting the legitimate government interest.

The Arkansas Court of Appeals held that the checkpoint that led to Whalen's arrest was conducted in an illegal manner. In its reasoning, the Court noted that there was no supervision over the checkpoint, and there was no limitation on the discretion of officers in the field. Additionally, the Court stated that the officers' failure to record how many vehicles they came in contact with beyond those ticketed or arrested prevents any possible determination of the effectiveness of the checkpoint. Furthermore, the Court said that the State failed to direct it to any evidence in the record, documentary or testimonial, regarding official department procedure for police checkpoints. For these reasons, the Court concluded that it could not say that the checkpoint was conducted according to a plan or that it was conducted in a manner exhibiting explicit, neutral limitations on the officer's conduct. Therefore, the trial court was reversed, and the case against Whalen was

dismissed.

Case: This case was decided by the Arkansas Court of Appeals on December 9, 2015, and was an appeal from the Sebastian County Circuit Court, Fort Smith District, Honorable Stephen Tabor, Judge. The case citation is *Whalen v. State*, 2015 Ark. App. 706.

Presented by
Taylor Samples
Senior Deputy City Attorney

The Return of Hercules and Houdini?

U.S. v. Sanford

I. Summary

The Defendant, Dontay Dakwon Sanford, entered a conditional plea to felon in possession of a firearm, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and was sentenced to 96 months, largely due to an extensive criminal history. The conviction resulted from a search of automobile as part of an investigatory stop which quickly resulted in his arrest. He appealed the denial of his motion to suppress to the US Eight Circuit Court of Appeals. The denial was affirmed.

II. Facts

During the early morning hours of July 6, 2014, an employee at Club 319, a nightclub [*2] in Waterloo, Iowa, called the Waterloo Police Department to report that a patron at the bar threatened to "do something to somebody" when the bar closed. The employee did not give further information about the nature of the threat, but Waterloo Police Officers described the area surrounding Club 319 as a high crime area and reported that Club 319 had a very high call volume with higher risk calls, such as fights, stabbings, and shootings. The employee described the patron as a black male with dreadlocks who was wearing a white shirt and blue shorts.

At approximately 1:15 a.m., dispatch for the Waterloo Police Department relayed the report to officers. Officer Ryan Muhlenbruch arrived on the scene first, and he noticed a man — later identified as Sanford — matching the suspect's description walking towards a parked car in an alley halfway down the block from Club 319. Officer Muhlenbruch pulled his squad car into the alley and stopped, but he did not activate his lights or siren. Sanford walked around the car and toward the passenger door, at which point Officer Muhlenbruch exited his vehicle and yelled, "Hey, partner." Sanford made eye contact with Officer Muhlenbruch but continued [*3] into the passenger seat of the vehicle.

Officer Muhlenbruch approached the vehicle with a flashlight in one hand and his other hand on his holster. As he approached, he could see Sanford leaning forward in the passenger seat, and it appeared to Officer Muhlenbruch that Sanford was reaching for the console with his left hand while concealing an item below the seat in his right hand. Officer Muhlenbruch drew his firearm and instructed Sanford to show his hands, exit the vehicle, and place his hands on the top of the car. Sanford complied.

When Sanford exited, Officer Muhlenbruch recognized him from previous encounters. Officer Muhlenbruch knew from these encounters Sanford had a criminal history that included a conviction for burglary in the first degree and weapons charges.

Officer Muhlenbruch holstered his weapon, handcuffed Sanford, and patted him down for weapons. While he patted Sanford down, another officer arrived on the scene. The pat down did not reveal any weapons, so Officer Muhlenbruch returned to his squad car, placed Sanford in the back, and called in the license plate number of the vehicle Sanford was seated in. The license plate check indicated the vehicle was a rental. [*4] Officer Muhlenbruch then searched the passenger compartment of the vehicle, where he found a loaded Ruger .357 revolver under the passenger seat.

Officer Muhlenbruch returned to his squad vehicle, read Sanford his Miranda warnings, and asked Sanford if he wanted to talk. Sanford said, "I ain't talking to you about shit." While officers processed the scene, a recording system in the squad car captured Sanford making a number of incriminating statements during a personal phone call.

United States v. Sanford, 2016 U.S. App. LEXIS 2603, 1-4 (8th Cir. Iowa Feb. 16, 2016)

III. Law

A Terry Stop, as defined in *Terry v. Ohio*, is an investigative detention not rising to the level of full arrest. There is no clear line between investigative stops and de facto arrests." *United States v. Sanford*, 2016 U.S. App. LEXIS 2603 (8th Cir. Iowa Feb. 16, 2016) (quoting *United States v. Guevara*, 731 F.3d 824, 831 (8th Cir. 2013)). An arrest occurs when an officer uses more intrusive means of restraint than necessary for a purely investigative stop. A Terry stop may become an arrest if it involves excessive delay or unreasonable force. *Id.* Officers may take reasonable measures and use reasonable means to protect their safety during a Terry stop. These measures may include brandishing a firearm or employment of handcuffs to "control the scene and protect their safety." *Id* (quoting *United States v. Fisher*, 364 F.3d 970, 973 (8th Cir. 2004)).

IV. Analysis

The 1969 case of *Chimel v. California*, 395 U.S. 752, 762—763 (1969) established a doctrine which would endure in search and seizure law for nearly 40 years. That doctrine was the "Hercules and Houdini" doctrine. In that case, a full search of an automobile was sanctioned by the US Supreme Court as an allowable search incident to arrest. The standard was a bright-line rule and not subject to factual analysis beyond the legitimacy of the arrest itself. The theory was that "despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence from his vehicle–a theory that calls to mind Judge Goldberg's reference to the mythical arrestee "possessed of the skill of Houdini and the strength of Hercules."" *Thornton v. US*, 541 U.S. 615 (2004), 325 F.3d 189, *Justice Scalia, Concurring and quoting United States v. Frick*, 490 F.2d 666, 673 (CA5 1973). This doctrine was overturned in *Arizona v. Gant*, 129 S. Ct. 1710, 1719 n.3 (2009). Under *Gant*, the standard is now more limited and two-pronged, dealing with immediate threats and the reason for the stop.

In *US v. Sanford*, the lower Court appears to be incrementally moving back to the older SIA

doctrine. Here, an individual was stopped, immediately placed in hand-cuffs and placed in the officer's patrol car before the search commenced.

The issue before the Court of Appeals was the legitimacy of the search. Specifically, the Court analyzed the question of whether the circumstances represented an arrest or an investigatory stop. The Court reviewed each act to determine reasonability under *Terry v. Ohio*. The Court first noted the environment. The area was not simply listed as "high crime." The facts submitted to the trial Court included the volume of calls in general and the volume of fights, stabbings and shootings in that specific area. The time of day was 1:15 a.m. and a threat had been made to a local night club for some act to take place at closing time.

The Court found the initial encounter particularly worthy of analysis. The suspect had made movements just as the officer approached which were deemed as "furtive." The Court reasoned that such movements, in this case both the act of reaching into a console and the contemporaneous act of concealing an item below the seat, indicated a threat to the officer. With these movements alone, it was reasonable to conclude that the subject was dangerous. With these factors, the Court noted that the officer having his weapon ready in hand, removing the suspect from the vehicle, placing the suspect in cuffs and conducting a "protective sweep" of the vehicle was reasonable. The Court went on to conclude that these measures were collectively reasonable under the totality of circumstances and not more intrusive than necessary.

The Court basically held that an individual cuffed in the back of a patrol car was NOT under arrest and therefore the search was NOT a search incident to arrest. The reasoning for this conclusion was that the individual could have been released. This conclusion elicited very little discussion by the Court. No analysis was made as to the specific point of arrest or the point at which a decision to arrest was made. This *non-arrest* distinction allowed for different analysis and avoided the *Arizona v. Gant* standard.

The motion to suppress evidence was denied. The conviction and sentence were affirmed.

Important points:

- This is an Eight Circuit opinion and not yet settled law.
- This case was highly fact-specific.

Case: *U.S. v. Sanford,* 2016 U.S. App. LEXIS 2603 (8th Cir. Iowa Feb. 16, 2016)

Presented by

David Phillips

Deputy City Attorney

Supreme Court of United States Holds That Officer Who Killed Suspect in High Speed Chase was Entitled to Qualified Immunity

FACTS TAKEN FROM THE CASE

On the evening of March 23, 2010, Sergeant Randy Baker of the Tulia, Texas Police Department followed Israel Leija, Jr., to a drive-in restaurant, with a warrant for his arrest. Sergeant Baker approached Leija's car and told him that he was under arrest, whereupon Leija sped off headed toward Interstate 27. Sergeant Baker gave chase and was joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety. Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Twice during the chase, Leija called the Tulia Police dispatcher and claimed to have a gun that he would use to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats to police, along with a report that Leija might be intoxicated.

As Sergeant Baker and Trooper Rodriguez maintained pursuant of Leija, other police officers set up tire spikes at three locations. Canyon Police Department Officer Troy Ducheneaux manned the spike strip at the first location Leija was expected to reach. Officer Ducheneaux had received training on the deployment of spike strips. Trooper Chadrin Mullenix also responded to the first location Leija was expected to reach, initially intending to set up a spike strip there. Upon learning of the other spike strip locations, Trooper Mullenix began to consider another tactic, shooting at Leija's car in order to disable it. Trooper Mullenix had not received training in this tactic and had not attempted it before, and he radioed the idea to Trooper Rodriguez, who responded "10-4", gave his position, and said that Leija had slowed to 85 miles per hour. Trooper Mullenix then asked dispatch to inform his supervisor, Sergeant Byrd, of his plan, and ask Byrd if it was "worth doing." Before receiving Byrd's response, Trooper Mullenix exited his vehicle armed with his service rifle and took a shooting position on the overpass, 20 feet above I-27.

As Trooper Mullenix waited for Leija to arrive, he discussed with Deputy Tom Shipman whether his plan would work and how and where to shoot the vehicle to best carry it out. Around three minutes after Trooper Mullenix took up his shooting position, he spotted Leija's vehicle, with Trooper Rodriguez in pursuit. As Leija approached the overpass, Trooper Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Trooper Mullenix's shots, four of which struck Leija's upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block.

Trooper Mullenix was sued under 42 U.S.C. Section 1983 under the theory that he had violated the Fourth Amendment by using excessive force against Leija. Trooper Mullenix moved for summary judgment on the ground of qualified immunity, but the U.S. District Court denied his motion, concluding that there were genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances. Trooper Mullenix appealed to the U.S. Court of Appeals for the Fifth Circuit, who affirmed the ruling of the District Court, holding that the immediacy of the risk posed by Leija is a disputed fact that a

reasonable jury could find either in the favor of Leija's estate or in the favor of Trooper Mullenix. Trooper Mullenix then appealed the issue of his qualified immunity to the Supreme Court of the United States.

ARGUMENT AND DECISION BY THE SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States (Court) first discussed the rule on qualified immunity. The Court said that qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The Court stated that a clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. The Court said that it does not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate; simply stated, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

The Court said that it has repeatedly told courts not to define clearly established law at a high level of generality, and the dispositive question is whether the violative nature of particular conduct is clearly established. The Court stated that this inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. The Court noted that such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the doctrine of excessive force will apply to the factual situation confronted by the officer.

The Supreme Court of the United States reversed the holding of the U.S. District Court and the U.S. Court of Appeals for the Fifth Circuit, and the Court held that Trooper Mullenix was entitled to qualified immunity. In its reasoning, the Court noted that in its prior decision of *Brosseau v. Haugen*, 543 U.S. 194 (2004), it held that a police officer was entitled to qualified immunity after being confronted with the situation of deciding whether to shoot a disturbed felon who was set on avoiding capture through vehicular flight when persons in the immediate area were put at risk. The Court stated that Trooper Mullenix was confronted with a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice had threatened to shoot police officers and was moments away from encountering an officer at the overpass location. The Court said that the relevant inquiry is whether existing precedent placed the conclusion that Trooper Mullenix acted unreasonably in these circumstances beyond debate. The Court concluded that far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Trooper Mullenix acted. The Court pointed-out that the threat Leija posed was at least as immediate as that presented by the suspect in the *Brosseau* case. The Court noted that by the time Trooper Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing toward an officer's location. Finally, the Court said that it has thus far never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone be a basis for denying qualified immunity. Because the constitutional rule applied by the Fifth Circuit was not beyond debate, the Court granted Trooper Mullenix's petition for certiorari and reversed the lower courts.

Case: This case was decided by the Supreme Court of the United States on November 9, 2015, and was an appeal from the United States Court of Appeals for the Fifth Circuit. The case citation is *Mullenix v. Luna, Individually and as Representative of the Estate of Israel Leija, Jr., et al.*, 577 U.S. _____ (2015).

Presented by Taylor Samples,
Senior Deputy City Attorney

Dual-Role Testimony

I. Summary

Defendant/Appellant Ismael Aldana Moralez was convicted on drug charges following a Federal investigation involving wire-tapping and other surveillance. Expert testimony by an assigned investigator who participated in the investigation was part of the incriminating evidence used to gain the conviction.

II. Facts

In June 2010, the Kansas City, Missouri Police Department and federal agents began investigating Moralez for narcotics trafficking. Using controlled buys and telephone surveillance, investigators documented Moralez selling cocaine to lower level dealers. He was arrested and indicted on eleven counts of distributing and one count of conspiring to distribute [**2] cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846; one count of using a communication facility to facilitate a drug felony in violation of 21 U.S.C. § 843 (b) and 18 U.S.C. § 2; one count of improperly entering the country as an alien in violation of 8 U.S.C. § 1325 (a); one count of being an illegal alien in possession of ammunition in violation of 18 U.S.C. § 922(g)(5)(A); and two counts of distributing the proceeds of drug sales to Guatemala in violation of 18 U.S.C. §§ 1956(a)(2)(B)(i), 2.

At trial, Special Agent James Taylor testified in both a lay and expert capacity. As a lay witness, Agent Taylor testified about his personal knowledge of the investigation, which he had supervised. He identified Moralez, testified concerning the surveillance technology that the investigators had used, identified which of the wire-tapped cellular telephones belonged to Moralez, and authenticated evidence. The prosecution then laid foundation for Agent Taylor's expertise in the use of coded language or "drug jargon" by narcotics dealers. Agent Taylor identified Moralez's voice and translated drug jargon in a series of eight recorded conversations. For example, Taylor explained that "work" referred to the availability of cocaine [**3] and that a stated wage such as "$9.50 an hour" signaled a price of $950 for an ounce of cocaine.

United States v. Moralez, 808 F.3d 362, 364 (8th Cir. Mo. 2015)

III. Law

Federal Rule of Evidence 702 and Arkansas Rule of Evidence 702 are similar in content. Both rules allow for testimony by witnesses that can be qualified as experts where the expert possesses knowledge, skill, experience, training, or education that will assist the trier of fact to understand the evidence or to determine a fact at issue.

The common law test for appropriate expert testimony, under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), is two-fold: 1) Is the testimony reliable, and 2) Does it fit the case. In Arkansas, the threshold question for determining the admissibility of expert testimony deals with the ordinary understanding of a juror.

The Court acknowledged appellate review of other cases that included testimony of case officers as both fact witnesses and as limited-scope expert witnesses, such as in *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996), in which officers testified as to the meaning of drug-culture jargon and code words. But the Court in *United States v. Moralez*, 808 F.3d (8th Cir. Mo. 2015) acknowledged that no case law had previously addressed the risks to due process associated with dual-role testimony. To that extent, the case was one of first

impression in the Eighth Circuit.

IV. Analysis

The defense argued that qualifying a fact witness as an expert witness was an abuse of discretion on the part of the trial judge. Defense further argued that allowing a fact witness to also assume expert status in a jury trial would lead to enhanced credibility of the witness in factual testimony and would also lead to jury confusion as to the degree of credibility associated with specific testimony.

The Court reviewed such testimony and surrounding safeguards in other jurisdictions. The Court noted that all jurisdictions allow dual testimony from officers and that such testimony can be helpful to the finder of fact. The key challenge is to separate the rolls; that of occurrence or fact witness from that of expert witness.

In *Delpit*, the testifying officer had a tendency to move from reliable methodologies into sweeping conclusions. Also, in *United States v. Garcia*, 752 F.3d 382, 392 (4th Cir. 2014), the dual-role witness offered his personal knowledge of the facts surrounding the investigation as a basis for his expertise, did not apply reliable methodologies, and often failed to state any foundation for his interpretations. 752 F.3d at 391-92. In *Garcia*, the conviction was overturned by the Fourth Circuit Court of Appeals. The conviction in *Delpit* was affirmed, as the infractions were not overly prejudicial to the defense.

But in *Moralez*, the testimonial roles were clearly segregated by the prosecutor. The prosecution made clear transitions into and out of Agent Taylor's expert testimony and consistently referenced his "experience" when asking about drug jargon. The example of "I'd like to shift gears here a little bit and talk about some of your education, professional training, [**7] and law enforcement experience.")" was quoted by the Court from *United States v. Anchrum*, 590 F.3d 795, 804 (9th Cir. 2009) as a clear transition to prevent confusion and adhere to Federal Rule of Evidence 702. The Eighth Circuit held that the dual-role expert testimony in Moralez was not an abuse of discretion.

The conviction in *United States v. Moralez* was affirmed. The petition for rehearing en banc was denied, as was the petition for rehearing by the panel. *United States v. Moralez*, 2016 U.S. App. LEXIS 884 (8th Cir. Mo. Jan. 19, 2016).

<u>Important points</u>:

- Law enforcement expert testimony on drug jargon can be helpful to the finder of fact.
- Dual-role witness testimony must be effectively controlled by the prosecutor to prevent a violation of Arkansas Rule of Evidence 702, which is substantially similar to the Federal rule.

U.S. v. Moralez, 808 F.3d 362 (8th Cir. Mo. 2015)

Presented by

David Phillips

Deputy City Attorney

Arkansas Court of Appeals Holds That DWI Driver was Illegally Stopped and Evidence Should Have Been Suppressed

FACTS TAKEN FROM THE CASE

On March 16, 2014, at around 1:00 a.m., Fayetteville Police Officer Kristin Mercado saw a black Chevy Tahoe parked in the Marvin's IGA parking lot approximately fifty feet off of the nearest public road. Marvin's IGA was closed, the Tahoe was parked and not moving, and there were no other vehicles in close proximity. As Officer Mercado was driving past the parking lot, she saw that the passenger-side door was open, and a passenger was leaning out of the vehicle vomiting. Officer Mercado observed the passenger vomit for ten to fifteen seconds, and Officer Mercado turned into the parking lot, stopped behind the Tahoe, and placed her spotlight on the car. Officer Mercado did not activate her blue lights at this time. Officer Mercado was not responding to any call concerning the Tahoe, Marvin's IGA, or the parking lot.

Prior to Officer Mercado getting out of her vehicle, but after she pulled in behind the Tahoe, the passenger finished vomiting, sat back up in the vehicle, and closed the passenger door. After the passenger shut the passenger door, the driver of the vehicle, William Meeks, started to drive toward an exit from the parking lot. Prior to Meeks' attempt to drive away, Officer Mercado did not do anything to indicate to Meeks that he needed to remain, that he should not leave, or that he needed to stop and talk with Officer Mercado. As Meeks was starting to exit the parking lot, he did not spin or squeal his tires, and he did not drive in an erratic, careless, or reckless manner.

Just as Meeks began to drive away, but while still in the parking lot, Officer Mercado activated her blue lights and notified dispatch that she was conducting a traffic stop. Before activating her blue lights, Officer Mercado did not see Meeks commit any traffic violation or criminal act, and Meeks immediately pulled into a parking place close to where he had originally stopped the Tahoe. Officer Mercado subsequently arrested Meeks and charged him with driving while intoxicated.

At the trial court, Meeks' attorney, Jon Nelson, filed a motion to suppress illegally obtained evidence. Attorney Nelson argued that Officer Mercado illegally stopped, detained, seized, and searched Meeks without a warrant in violation of the Fourth Amendment to the U.S. Constitution, article 2, section 15 of the Arkansas Constitution, and the Arkansas Rules of Criminal Procedure. In particular, Attorney Nelson claimed that Officer Mercado seized Meeks by conducting a traffic stop without reasonable suspicion as required by Arkansas Rule of Criminal Procedure 3.1, and that the stop was not authorized by Officer Mercado's community-caretaking function or any emergency-aid exception. The trial court denied Meeks' motion to suppress evidence, and Meeks entered a conditional plea to driving while intoxicated, yet preserved his right to appeal to the Arkansas Court Appeals.

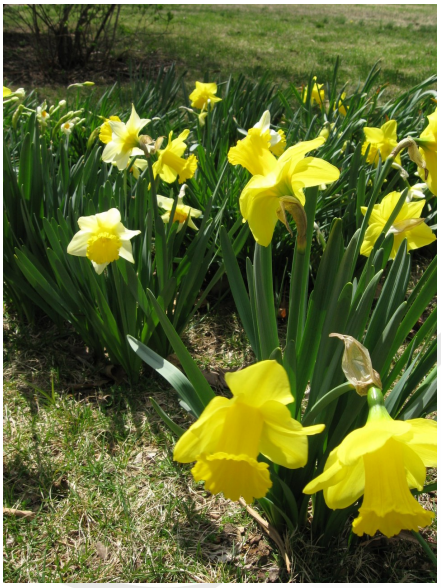
ARGUMENT AND DECISION BY THE COURT OF APPEALS

(1) Analysis of Reasonable Suspicion of Criminal Activity and Probable Cause of Traffic Violation

The Arkansas Court of Appeals (Court) first addressed Meeks' claim that he was pulled over by Officer Mercado while obeying the law, committing no traffic or criminal violation, and doing nothing more than he had the legal right to do. In setting forth the

applicable law, the Court stated that in Arkansas, all police-citizen encounters are classified into one of three categories: (1) a consensual, voluntary encounter; (2) a seizure; or (3) an arrest. The Court said that all police-citizen encounters are transformed into a seizure when a reasonable person would believe that he is not free to leave. The Court noted that it is well settled law in Arkansas that a person is seized by a police officer when the officer effectuates a traffic stop by using blue lights. Additionally, the Court said that the prohibition against unreasonable searches and seizures not supported by probable cause or reasonable suspicion extend to even brief investigatory stops of persons or vehicles.

The Court held that Officer Mercado did not have probable



cause or reasonable suspicion to activate her blue lights and seize Meeks. The Court noted that Arkansas law allows a law enforcement officer lawfully present in any place to seize a person or vehicle if the officer has under the totality of the circumstances specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. The Court continued that the seizure must be based on a reasonable suspicion that the person has committed or is about to commit a crime, and that pursuant to Arkansas Rule of Criminal Procedure 3.1 an officer may stop and detain any person he or she reasonably suspects is committing, has committed, or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or property. Furthermore, the Court stated that reasonable suspicion is suspicion that is based on facts or circumstances which give rise to more than a bare, imaginary, or purely conjectural suspicion. Finally, the Court said that an officer is justified in making a traffic stop if he or she has probable cause to believe that the vehicle has violated traffic law.

In its reasoning, Court noted that Officer Mercado in her own testimony admitted that she had neither reasonable suspicion that a crime had been committed nor probable cause of a traffic violation. The Court pointed-out that Officer Mercado testified that she was not making a traffic stop on Meeks because she had not observed any infractions, but that she was just pulling in to check on the vehicle and its occupants. The Court concluded that based on Officer Mercado's testimony, combined with the Court's review of the dash-cam video of the stop, the trial court's denial of Meeks' motion to suppress was clearly erroneous. The Court was dismissive of the fact that Meeks' passenger was leaning out of the car and vomiting, stating that such an act gives rise to a suspicion only that the passenger was sick, which is not illegal in Arkansas. The Court noted that Meeks' vehicle was not parked improperly, and that Meeks did not flee or evade Officer Mercado.

(2) Analysis of Community-Caretaking Function or Emergency Aid Exception

Next, the Court analyzed whether Officer Mercado's stop of Meeks was authorized by Officer Mercado's community caretaking function or emergency-aid exception. The Court stated that precedent from the Eighth Circuit and State of Arkansas acknowledges that certain situations give rise to an officer's community caretaking function, where an officer engages in what may be described as activity totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. The Court said that some examples of the community caretaking function are an officer responding to the scene of an accident and making contact with those present, and responding to a report of an abandoned vehi-

cle on a public highway that constitutes a hazard to public safety. The Court continued that the community caretaking function has even been held to apply in situations where a driver appears to be passed out or asleep in a vehicle, most recently in the case of *Szabo v. State,* 2015 Ark. App. 512.

The Court held that Officer Mercado's stop of Meeks was not supported by the community caretaking function or the emergency-aid exception. The Court reasoned that Officer Mercado was not responding to any type of report, and that Meeks never said or did anything to give Officer Mercado the impression that Meeks needed her help. The Court said that in order to justify her actions based on an alleged medical emergency, Officer Mercado must have had an objective basis for believing that someone in the vehicle was in immediate need of assistance or was in imminent danger. The Court reasoned that Meeks' vomiting passenger showed no signs of having anything more serious than an upset stomach, and nothing indicated that Meeks could not provide whatever assistance the passenger needed. The Court reasoned that unlike a case from Nebraska, *State v. Rohde*, 864 N.W.2d 704 (Neb. Ct. App. 2015), where the community caretaking function was held to apply when an officer stopped a vehicle after observing a female passenger's upper body sticking out through the moon roof of a moving vehicle waving her arms in order to determine if she may have been trying to wave the officer down for assistance, neither Meeks nor his passenger indicated a need or desire for assistance from Officer Mercado. In sum, the Court concluded that there were no facts to indicate that Meeks or his passenger were in immediate danger, or that anyone in the vehicle was in need of immediate aid. Therefore, the Court concluded that the trial court erred by denying Meeks' motion to suppress evidence, and all evidence obtained after the illegal seizure of Meeks should have been suppressed.

Case: This case was decided by the Arkansas Court of Appeals on January 13, 2016, and was an appeal from the Washington County Circuit Court. The case citation is *Meeks v. State*, 2016 Ark. App. 9.

Presented by

Taylor Samples, Senior Deputy City Attorney

Plane Facts

I. Summary

The Defendant, Quincy Jackson, entered a conditional plea to possessing Marijuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D). The conviction resulted from a search of his airplane and discovery of 39 bags of marijuana. He appealed the denial of his motion to suppress to the US Eight Circuit Court of Appeals. The denial was affirmed.

II. Facts

On the evening of November 27, 2012, Jackson's small aircraft diverted from its original flight plan—Wichita, Kansas to Jacksonville, Illinois—and landed at the downtown airport in Kansas

City. Homeland Security agents, finding this suspicious, alerted the Airport Police. They called for a dog trained to detect illegal drugs. This was her first field operation. She had a 97 percent success rate during training. She alerted positively to narcotics near both wings of Jackson's aircraft.

Drug Enforcement Agency agents learned Jackson was [*2] staying at a nearby hotel. Arriving there, about midnight, they knocked on the door seeking his consent to search. No one answered. An agent called Jackson's room. He answered, saying he would come to the door, but he didn't. After more calls to Jackson's cell phone and the room, agents smelled a strong odor emanating from the room, like Swisher Sweet cigars—commonly used to smoke marijuana. A different dog came to the hotel but did not alert.

At 2:00 a.m., an agent returned to the aircraft to draft an affidavit for a warrant. The agent learned Jackson had his pilot's license less than a month and had registered the plane five months earlier. The agent submitted the draft at about 8:00 a.m., but the prosecutor requested adding the drug dog's certification.

Also around 8:00 a.m., Jackson left his room. Two agents approached. He ran back into his room. The agents followed through the open door, handcuffed him, and read him his Miranda rights. They stayed with Jackson until check-out time, when they drove him to the Airport. An agent remained with him there. A search warrant issued at about 5:40 p.m. that evening. Agents searched the aircraft, finding two large boxes with 39 bags of marijuana, [*3] weighing 15.7 kilograms.

United States v. Jackson, 2016 U.S. App. LEXIS 1350, 1-3 (8th Cir. Mo. Jan. 28, 2016)

III. Law

The test for determining if a canine alert is adequate basis for a search is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that [*4] a search would reveal contraband or evidence of a crime." *Florida v. Harris*, 133 S.Ct. 1050, 1058, 185 L. Ed. 2d 61 (2013). *Id* at 3-4.

"[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." *Id*.

IV. Analysis

The Defendant argued that there was no probable cause for the search. His reasoning was that the affidavit for search, which was based on the alert by the narcotics detection dog, contained inadequate information about the dog's reliability. The Court applied the standard articulated in *Florida v. Harris* in weighing the merits of this claim. In that case, a Florida Officer employed his narcotics detection dog to perform a sniff test, due largely to the demeanor of the driver. The test resulted in an alert. The subsequent search revealed contraband, but nothing the dog employed was trained to detect. The search was held valid.

The US Supreme Court in *Harris* acknowledged that field records do not adequately capture actual performance, given undocumented false negatives and some positives regarded as false, but in which the contraband is too well hidden for discovery. The Supreme Court in the *Harris* case set the standard for sufficiency of a probable cause search as resting on records of training. The rationale was that performance is more accurately measured in a controlled environment. Therefore, a well-trained dog's alert indicates "a fair probability--all that is required for probable cause--that either drugs or evidence of a drug crime … will be found." *Florida v. Harris*, 133 S. Ct. 1050, 1057 (U.S. 2013). The Court in the *Jackson* case held that "[t]he positive alert by a reliable dog alone established probable cause." *United States v. Jackson*, 2016 U.S. App. LEXIS 1350, *internal citation omitted*.

The Defendant/Appellant alternatively argued that his arrest directly yielded the physical

evidence and that the arrest was illegal and the evidence therefore should be suppressed. The defense argument here was that had the Defendant/Appellant not been arrested, he would have flown away in his marijuana-filled aircraft and there would be no evidence. The Court spent little time on this rather far-reaching argument and skipped over the bigger question of whether the arrest was legal. Instead, the Court noted that no statements were made by the defendant while he was in custody and no evidence was gained directly from his arrest.

The Court also noted that the automobile exception applies to aircraft and the aircraft was not going anywhere. "Because there was probable cause that the aircraft contained evidence of a crime, the plane could be held until the warrant issued." *United States v. Jackson*, 2016 U.S. App. LEXIS 1350 (8th Cir. Mo. Jan. 28, 2016).

The denial of the motion to suppress and subsequent conviction were affirmed.

Important points:

- An affidavit for a search warrant "need only state the dog has been trained and certified to detect drugs" to meet the Federal standard for probable cause.
- An arrest, where no evidence is gained directly from the arrest itself, will have no effect on a contemporaneous search based on probable cause.

United States v. Jackson, 2016 U.S. App. LEXIS 1350 (8th Cir. Mo. Jan. 28, 2016).

Presented by
David Phillips
Deputy City Attorney

Arkansas Court of Appeals Holds that Motion to Suppress Properly Denied Since 3.1 Seizure was Valid and No Miranda Violation Occurred

FACTS TAKEN FROM THE CASE

On April 16, 2011, Conway Police Officer Andrew Birmingham responded to a call that Antwan Fowler had pointed a gun at someone on Oak Street and then left in a black Ford Taurus. Another officer located a black Ford Taurus at a nearby gas station, and Officer Birmingham pulled up behind the vehicle and relayed the license plate number, which returned to Antwan Fowler. Officer Birmingham rolled down the window of his patrol car and saw that a man, later identified as Fowler, was standing near the vehicle. **Officer Birmingham asked if they could talk, and in response,**

Fowler lifted his shirt to show his waistband. Officer Birmingham asked Fowler to turn around so that Officer Birmingham could verify that Fowler did not have a weapon. Fowler approached Officer Birmingham's vehicle on foot, and Officer Birmingham asked Fowler if he had any weapons on his person. Fowler said that he did not, but that he did have a gun in his car. At that point, for safety purposes, Officer Birmingham handcuffed Fowler but told him that he was not under arrest. Officer Birmingham then read Fowler Miranda rights and activated his audio/video recorder. In the video, Fowler is shown to again admit to having a gun in his vehicle and being a convicted felon. Officer Birmingham admitted that when he made contact with Fowler and asked to speak with him that Fowler was not free to leave.

Fowler argued to the trial court that Officer Birmingham did not have probable cause or particularized suspicion to justify questioning Fowler and that Fowler was in custody and should have been Mirandized as soon as Officer Birmingham approached Fowler. Therefore, Fowler claimed that his statements made to Officer Birmingham and the discovery of the weapon should have been suppressed. The trial court denied Fowler's motion to suppress evidence, and Fowler was subsequently found guilty by a jury to possession of a firearm by certain persons and sentenced to eighteen years' imprisonment. Fowler appealed the trial court's denial of his motion to suppress to the Arkansas Court of Appeals.

ARGUMENT AND DECISION BY THE COURT OF APPEALS

On appeal to the Arkansas Court of Appeals (Court), Fowler claimed that Officer Birmingham's stop and seizure of Fowler could not have been based upon any reasonable articulated suspicion sufficient to authorize even an investigatory stop as Officer Birmingham had no reason to believe that a crime was afoot. The State countered Fowler's argument by claiming Officer Birmingham did have reasonable suspicion that the man standing near the Taurus was Fowler, and that Fowler may have committed an aggravated assault. The State noted that there was a connection between the reported crime, the black Ford Taurus registered to Fowler, and Fowler's proximity to the Taurus.

The Court first set forth the applicable law by quoting Rule 3.1 of the Arkansas Rules of Criminal Procedure:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

The Court said that reasonable suspicion is defined as a suspicion that is based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Finally, the Court noted that an investigative stop is justified when, under the totality of the circumstances, the police have a specific, particularized, and articulable reason indicating that the person may be involved in criminal activity.

Next, the Court set forth the rule on Miranda. The Court stated that Miranda's safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. The Court said that Miranda warnings are not required simply because the questioned person is a suspect, and that a person is "in custody" for purposes of Miranda warnings

when he is deprived of his freedom by formal arrest or restraint on freedom of movement of the degree associated with formal arrest. The Court continued that the relevant inquiry is how a reasonable person in the suspect's shoes would have understood his situation. Finally, the Court pointed-out that a lawful detention under Rule 3.1 does not curtail a person's freedom of action to a degree associated with a formal arrest, and a Miranda warning is not required.

In addressing the facts as presented by Officer Birmingham and Fowler, the Court held that Officer Birmingham's initial approach was based on reasonable suspicion, considering the matching vehicle description, its proximity to the location of the alleged aggravated assault, and the identification of the vehicle as belonging to Antwan Fowler. The Court also held that Officer Birmingham's initial inquiry of whether Fowler had any weapons on his person was not the result of a custodial interrogation and did not therefore require a Miranda warning. The Court noted that Officer Birmingham testified that he asked the initial question as Fowler approached his vehicle, before placing Fowler in handcuffs, and that Officer Birmingham did Mirandize Fowler after placing him in handcuffs. Finally, the Court stated that the transcript of the recording clearly established that Fowler told Officer Birmingham, after the officer had read Miranda rights, that Fowler had a gun and was a felon in possession of a firearm. For these reasons, the trial court's denial of Fowler's motion to suppress was affirmed.

Case: This case was decided by the Arkansas Court of Appeals on April 15, 2015, and was an appeal from the Faulkner County Circuit Court, David Reynolds, Judge. The case citation is *Fowler v. State*, 2015 Ark. App. 232.

Presented by

Taylor Samples, Senior Deputy City Attorney

Supreme Court of United States Holds That Defendant Is Entitled to New Trial Because State Failed to Disclose Evidence

FACTS TAKEN FROM THE CASE

Sometime between 8:20 p.m. and 9:30 p.m. on April 4, 1998, Eric Walber was murdered. Nearly two years after the murder, Sam Scott, who was at the time incarcerated, contacted authorities and implicated Michael Wearry. Scott initially reported that he had been friends with the victim; that he was at work on the night of the murder; that the victim had come looking for him but had instead run into Wearry and four others; and that Wearry and the others had later confessed to shooting and driving over the victim before leaving his body on Blahut Road. But in fact, the victim

had not been shot, and his body had been found on Crisp Road. Scott changed his account of the crime over the course of four later statements, each of which differed from the others in material ways. By the time Scott testified as the State's star witness at Wearry's trial, Scott's story bore little resemblance to his original account. According to the version Scott told the jury, Scott had been playing dice with Wearry and others when the victim drove past. Wearry, who had been losing, decided to rob the victim. After Wearry and Randy Hutchinson stopped the victim's car, Hutchison shoved the victim into the cargo area. Five men, including Scott, Hutchison, and Wearry, proceeded to drive around and encountered Eric Brown, the State's other main witness, and paused intermittently to assault the victim. Finally, according to Scott, Wearry and two others killed the victim by running him over. On cross examination, Scott admitted that he had changed his account multiple times.

The State's other main witness, Eric Brown, testified consistently with Scott's testimony, saying on the night of the murder he had seen Wearry and others with a man who looked like the victim. Brown, who was incarcerated on unrelated charges at the time of Wearry's trial, acknowledged that he had made a prior inconsistent to the police, but he had recanted and agreed to testify against Wearry, not for any prosecutorial favor, but solely because his sister knew the victim's sister. The State did not present any physical evidence at trial, but it did offer additional circumstantial evidence linking Wearry to the victim. Wearry's defense at trial rested on an alibi that claimed he was 40 miles away in Baton Rouge at a wedding reception at the time of the murder.

Following Wearry's conviction, it emerged that the prosecution had withheld relevant information that could have been considered favorable to Wearry. First, previously undisclosed police records showed that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility. One inmate reported hearing Scott say that he wanted to make sure Wearry got the needle because he jacked Scott over. The other inmate reported that Scott had told him to lie about witnessing the murder when he had not actually witnessed it. Second, the State had failed to disclose that, contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry. Third, the prosecution had failed to turn over medical records on Randy Hutchinson. Scott testified that Hutchinson had run into the street to flag down the victim, pulled the victim out of the car, shoved the victim into the cargo space, and crawled into the cargo space himself. Hutchinson's undisclosed medical records revealed that nine days before the murder Hutchinson had undergone knee surgery to repair a ruptured patellar tendon.

Based on this new evidence, Wearry alleged violations of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Both the post-conviction court and the Louisiana Supreme Court denied Wearry's petition. Wearry then appealed the decision to the Supreme Court of the United States.

ARGUMENT AND DECISION BY THE SUPREME COURT OF THE UNITED STATES

The Supreme Court of the United States (Court) reversed the decision of the post-conviction court and the Louisiana Supreme Court and held that the prosecution's failure to disclose material evidence violated Wearry's due process rights under *Brady v. Maryland*. The Court remanded the case to Louisiana State Court for a new trial. In setting forth the rule first enunciated in *Brady v. Maryland*, the Court said that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court continued by saying that evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury. Finally, the Court said that to prevail on a *Brady* violation claim, the defendant need not show that he more likely than not would have been acquitted had the new evidence been admitted, but

only that the new evidence is sufficient to undermine confidence in the verdict.

The Court concluded that beyond doubt the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The Court reasoned that the State's trial evidence resembled a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi. The Court opined that the only evidence directly tying Wearry to the crime of capital murder is Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown. The Court pointed out that Scott's already impugned credibility would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Additionally, the Court said that the jury may have found Scott to be less credible had it known that Brown had come forward to testify not because of his sister's relationship with the victim's sister, as the State had claimed, but by the possibility of a reduced sentence on an existing conviction. The Court concluded by stating even if the jury, armed with all the new evidence, could have voted to convict Wearry, it had no confidence that it would have done so.

Case: This case was decided by the Supreme Court of the United States on March 7, 2016. The case citation is *Wearry v. Cain*, 577 U.S. _____ (2016).

Presented by
Taylor Samples, Senior Deputy City Attorney

A Police Officer's Prayer

Lord I ask for courage
Courage to face and conquer my own fears,
I ask for strength, strength of body to protect others
and strength of spirit to lead others.
I ask for dedication, dedication to my job, to do it well,
Dedication to my community to keep it safe,
Give me Lord, concern for others who trust me
and compassion for those who need me
And please Lord, through it all be by my side.

Author Unknown